

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**STEVEN CLARK BRUCE
DIANE MARIE BRUCE,**

Debtors.

Case No. **04-63383-13**

MEMORANDUM OF DECISION

At Butte in said District this 11th day of May, 2005.

In this Chapter 13 case a hearing was held after due notice at Great Falls on January 27-28, 2005, on the Debtors' motion for sanctions against American General Finance, Inc. (hereinafter "American General") for willful violation of the automatic stay under 11 U.S.C. § 362(h), filed November 30, 2004, and American General's objection thereto filed December 9, 2004. The Debtors and American General each were represented at the hearing by counsel – Randy L. Tarum ("Tarum") for the Debtor and Greg A. Luinstra ("Luinstra") for American General. Both Debtors Steven Clark Bruce ("Steven") and Diane Marie Bruce ("Diane") (together "Bruces" or "Debtors") testified, as did American General's branch manager Lorrie Sharp ("Sharp"). American General's Exhibits ("Ex.") A and B¹ were admitted into evidence without objection. At the conclusion of the parties' cases-in-chief the Court closed the record² and granted the parties time to file simultaneous briefs, after which Debtors' motion would be

¹Ex. A and B are identical to Debtors' Ex. 1 and 2, respectively.

²American General's post-hearing motion to reopen the record to offer portions of its policies and procedures manual was denied by Order entered March 24, 2005.

taken under advisement. The parties' briefs have been filed and reviewed by the Court, together with the record and applicable law. This matter is ready for decision. This Court has jurisdiction over this Chapter 13 case under 28 U.S.C. § 1334(a). Debtors' motion for sanctions for willful violations of the stay is a core proceeding under 28 U.S.C. § 157(b)(2).

At issue is whether American General's stay violations, Sharp's post-petition phone calls to Debtors, were willful and whether the record supports an award of sanctions against American General under § 362(h), including emotional distress damages and punitive damages. For the reasons set forth below, Debtors' motion for sanctions against American General will be granted and sanctions will be imposed against American General under § 362(h) by separate Order and Judgment, for its willful violations of the stay. This Memorandum of Decision includes the Court's findings of fact and conclusions of law as provided in F.R.B.P. 7052.

FACTS

Steven and Diane are married and have 3 daughters, two of whom were born premature and suffer from medical problems. Diane works as a secretary in the lab department at Benefis Hospital. Steven is an emergency medical technician ("EMT") and is presently employed as a phlebotomist. Steven testified that, ordinarily, he let Diane deal with their family's credit issues and payments, until she began to have seizures. Transcript ("Tr."), pp. 85-87.

Their daughter, Crystal, is 16 years old and has cerebral palsy. Steven had gallbladder surgery in December 2002, resulting in time off from work. While he was recuperating at home in January 2003 Crystal broke her leg, and later that August she had surgery for acute appendicitis. During testing it was discovered Crystal suffers from multiple seizures. Tr., p. 11. Because of Crystal's cerebral palsy Debtors home school their children because Crystal cannot sit

in a classroom for long periods. Steven and Diane work alternate shifts so that both can work with their kids on their schooling.

Diane suffers continuous pain from surgery she underwent in 1998 for cancer, including a total hysterectomy. Tr., p. 57. In the spring of 2003 Diane developed severe anaphylactic reactions resulting from environmental exposures, which put her in the emergency room on three occasions and caused her to miss work. Later that year, just before Thanksgiving, Diane had surgery to repair a hernia, followed by other corrective surgery to correct problems from childbirth. Tr., pp. 57-58. All these circumstances caused Diane a great deal of stress. Tr., p. 58.

Steven and Diane have two loans with American General. American General has 1400 branch offices in the United States and two million customers, loaning hundreds of millions of dollars per year and routinely dealing with bankruptcy issues. Tr., pp. 129-30. Sharp is American General's branch manger in Great Falls for almost 7 years, has been with the company 25 years, and is the loan officer for the Debtors' loans since 1999. Tr., pp. 89-90. Sharp's branch office has approximately 800 customers on its books. Tr., p. 158. Sharp testified she has been involved with bankruptcy cases in which American General has loaned money, that she understands the automatic stay through her company's policies and procedures manual, and that American General's policy is not to contact a debtor after a bankruptcy has been filed. Tr., p. 132.

Steven and Diane applied for a consolidation loan with American General in November of 1999 for medical bills, and have had several subsequent loans. One of their two current loans was taken out in November 2003, is secured by a second mortgage on their residence and a lien

on their car, and has a present balance of \$15,327.93. Ex. A, Tr., pp. 54, 68. The second loan was taken out to pay medical bills and consolidate other debt in July 2004, is secured by vacant land adjacent to their home, and has a current balance of about \$5,439. Ex. B, Tr., p. 54, 67-68, 91-92, 101. Sharp testified that the second loan was difficult to obtain approval for because of the Bruces' credit risk, and she had to go up two levels of management for approval. Tr., p. 91. Bruces used the loans to catch up on arrearages on other secured loans, pay off their vehicle, property taxes, and pay medical bills. Tr., p. 96.

Ex. A and B are American General's telephone record of activity on the Debtors' two loans. Tr., pp. 100-01. Sharp testified that American General records conversations on a computer by the employee engaged in the discussion typing into the computer during or shortly after the communication with the borrower or other activity. Tr., pp. 97, 154. She admitted, however, that Ex. A and B are not verbatim transcripts. Tr., p. 139. The American General employee starts typing into the computer record of a loan account while he or she is on the phone, and completes the entry during or shortly after the call ends within a minute or 2, and no edit, delete or change functions are available to alter anything placed in the phone log once a call is documented and the "enter" key is pressed. Tr., pp. 97, 99, 154.

American General documented its conversations with the Debtors on both accounts, Ex. A and B, if both were discussed. Tr., p. 101. Sharp testified that American General trains its employees to put the main points of the discussion into the comments, but that it is left to the determination of the person who enters the data what to include and what not to include. Tr., pp. 139-41. What is recorded in the notes is the response from the customer, and employees are instructed not to editorialize. Tr., p. 157

Diane testified that they have struggled to pay their medical bills for years, and were not able to keep their loans with American General current, and Sharp confirmed Bruces consistently were 1 or 2 payments past due. Tr., pp. 16, 91, 93. Diane testified that Sharp would call their home regarding the loans, and would call Diane at work until she asked Sharp to stop. Tr., pp. 17, 150. If Steven and Diane were not home, Sharp would leave a message on Debtors' answering machine³ or with their children, identifying herself and leaving a phone number and a request for return call. Tr., pp. 19, 45-46, 101-02; Ex. A, pp. 4, 9.

Sharp testified that Diane frequently came to American General's branch office to make payments. Tr., pp. 93-94, 124-25. At such times Diane and Sharp visited, and Diane's health issues were discussed. Tr., p. 94. Diane testified that in their conversations Sharp appears sympathetic at first, but is very persistent to the point she won't take "no" for an answer. Tr., p. 26. Sharp described their relationship as cordial and that Diane was very cooperative in working with Diane on payments. Tr., p. 94. Sharp testified she sometimes could sense frustration on Diane's part, but not anger. Tr., p. 95. Diane testified that she was friendlier with Sharp's subordinate, Jennifer, during her office visits, but tried to be cordial with Sharp. Tr., pp. 169-70.

Sharp and others from American General⁴ also came to the Bruces' home, marked on Ex. A as "FC" or "field call", without notice. Tr., p. 21; Ex. A, p. 7; Ex. B, p. 5-6. Diane testified that Sharp would insist on leaving with a check in hand, and so Diane would write a check knowing there were insufficient funds in her account to cover the check, or she would go to EZ Money or a payday loan company and take out a loan at 600% annual interest to cover the check.

³At some point Bruces changed their phone service and lost the ability to record voice messages until December of 2004. Tr., pp. 52-53.

⁴Diane testified Erin from American General also came to their home. Tr., pp. 59-60.

Tr., pp. 27-28.

In the Spring of 2004 Diane was exposed to tar during roofing work at her place of employment, which aggravated her asthma and anaphylactic reactions, again causing her to miss work and stay home. Tr., p. 14. In early September 2004 Diane woke up in the intensive care unit (“ICU”) with seizures. Ex. A shows a phone call from Steven to Sharp in September 14, 2004, where Steven informed Sharp that Diane was in the ICU with seizures. Tr., pp. 19, 103; Ex. A, p. 8, Ex. B, p. 8. Diane stayed in the ICU for 3 or 4 days that time, then was discharged.

On September 22, 2004, Sharp called Diane and woke her up. Ex. B, p. 7. Sharp testified that she knew Diane was having seizures, but when asked whether they were stress related Sharp testified that Diane told her she was over-medicated at the hospital. Tr., p. 137. That is not reflected on American General’s computer records for that conversation, Ex. B. Ex. B, pp. 7-8 includes Sharp’s notes of that conversation, in which Diane told Sharp: “She sd that they think she is having seizures because of the stress she is under. She sd that Steve has taken over the bills and . . . she will have him call me back.” Tr., p. 20. When confronted with that note in cross examination, Sharp changed her story and testified that Diane explained to her at a later date that it was because of her over-medication. When asked why that contact was not listed on Ex. A or B, Sharp changed her answer again and testified: “Actually, she was at the front counter telling my customer account specialist, Jennifer.” Tr., p. 138.

The stress affected not just Diane but also her daughters. Diane testified that their 13-year old daughter wanted to quit her schoolwork and get a job to help pay for the bills, and the 16-year old’s seizures became continuous from the stress, and she also wanted to get a job to help her parents pay their bills. Tr., p. 27.

About a week after Diane left the hospital she and Steven traveled to Portage, Wisconsin, to visit Diane's father who was ill. Diane's physician did not want Diane to travel, but approved the trip because they did not know if her father would survive, and he was familiar with Steve's capabilities as an EMT and felt he could care for Diane. Tr., p. 41. The trip was paid for mostly with \$1,500 their daughters gave them from money they earned babysitting. Tr., pp. 41-42. Bruces did not inform Sharp of the trip, and Sharp tried calling their home, made a field call to their home, and sent a demand letter when payments were late. Tr., pp. 104-07; Ex. A, pp. 6-7, Ex. B, pp. 5-7. Sharp tracked them down by calling Diane's mother's phone number in Wisconsin on September 29, 2004, where she learned the name of the motel where Bruces were staying and obtained a number from directory assistance. Tr., pp. 108-09; Ex. A, pp. 5-6; Ex. B, pp. 4-5.

When Sharp reached Diane she said they needed to make a payment on their second mortgage to avoid foreclosure. Tr., pp. 110-11. Diane told her she did not have any money, but from their daughters they obtained \$330 and sent it to American General by Western Union on September 30, 2004. Tr., pp. 24, 111-12; Ex. A, p. 4; Ex. B, p. 4.

Sharp testified that on September 30, 2004, she was instructed to prepare an internal "Pre-foreclosure Worksheet" on Steven and Diane's account because they were due for two payments, and if they did not make a payment that day Sharp was to submit it to her supervisor. Tr., p. 96. Because of the payment sent by the Debtors by Western Union from Wisconsin, foreclosure did not commence.

Diane testified that she was struggling with her mental/emotional state because of her seizures and her father's illness. Bruces returned to Montana from Wisconsin after 10 days. By

then Diane was sleeping only 2 hours a night from anxiety and stress over her bills and avoiding foreclosure, and she was making critical errors with patients at work that nearly terminated her job. Tr., pp. 28-29⁵. Diane testified that for a brief moment she contemplated taking her own life. She testified:

There's only so much one person can take when you're strapped with all this burden of caring for your family. Your children have no fault in this. I've tried to make our bills. I don't walk away. I just don't have the money to pay my bills. What is left, I come home to try to find some peace and solitude, and I can't because somebody's either knocking on the door or calling me. Or they call me at work, at my place of business; that affects me, so I've got to come home and try to regroup, try to look at my kids I wanted to take my life at one point. And that was just prior to me having all these seizures going on.

Tr., p. 31.

Diane could no longer help her daughters with their schoolwork. At some point, garnishment of Diane's wages by creditors began. Tr., pp. 31, 83-84. She testified that her daughters were aware of her struggles with finances, and they contributed their babysitting earnings to help pay for their own medication and activities. Tr., p. 60. Steve described their family as "pretty much undone mentally, physically, financially". Tr., p. 68. He described Diane as emotionally distraught over her medical problems and their bills, and he became very concerned with her mental status and ability to function at home. Tr., p. 70. He testified that he himself was "pretty much switched off emotionally" to survive and go through the motions, and that his children were very concerned and very aware of what was happening in their home. Tr., p. 70. In an effort to find a way for his family "to exist without constant harassment", Steven and

⁵American General raised a continuing objection to Diane's testimony of her prepetition stress on the grounds of relevance. The Court sustained the objection in part and overruled it in part and allowed Diane's testimony as background for her claim of emotional distress. Tr., p. 28.

Diane decided to seek bankruptcy protection.

Steven and Diane filed their voluntary Chapter 13 petition on November 8, 2004, with their Schedules and Statements. Steven testified that, after the petition was filed, Diane became more relaxed and was able to sleep nights and help around the house, and she suffered less pain in her neck and shoulder. Tr., p. 74. She and Steven felt a great sense of relief, which filtered down to their daughters, and they did not expect any further contact or stress from creditors. Tr., pp. 72-74. Diane testified that she is “pretty sure” she called Sharp within a week of the petition telling her they filed a bankruptcy petition on November 8, 2004, and American General would be kept informed and getting some papers. Tr., pp. 47-48.

Schedule E lists American General as a creditor secured by a second mortgage on Debtors’ residence and Chevy Lumina securing a claim in the amount of \$15,794.30, and another claim in the amount of \$5,632.48 secured by land and a van. Schedule J lists \$500 per month in medical and dental expenses.

The Notice of Commencement of case was sent out to creditors, including American General at 1223 10th Ave. S., Great Falls, MT 59405-5096, by the national bankruptcy noticing center on November 11, 2004. The Notice advises creditors in bold and enlarged print: “Creditors may not take certain actions”; then states: “The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor’s property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.” On the second page of the Notice the second “Explanations” box from the top states: “Creditors May Not State Certain Actions” with the further explanation:

Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include *contacting the debtor by telephone*, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor, repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. [Emphasis added].

Sharp testified that American General has had problems in the last several months getting mail, with payments sometimes not received for 10 days to 2 weeks of being sent. Tr., p. 137. But she admitted American General received the Notice of Commencement of Bruces' case. Despite such Notice and warnings, American General repeatedly violated the automatic stay when Sharp telephoned the Debtors.

Sharp testified that Jennifer, her customer account specialist at American General, receives and opens mail and generally forwards it to her the same day or the next morning, and Sharp makes a notation of the date received. Tr., pp. 116-17. Sharp testified that American General did not receive the Notice of the Debtors' bankruptcy case until November 24, 2004. Tr., p. 117. She testified that her office procedures are to handle bankruptcy notices as soon as she gets them. Tr., p. 154. Under cross examination, however, Sharp admitted that she does not know when the Notice actually arrived at her American General branch office. Tr., pp. 134-35. She testified that there is no policy to record a document received on the date it's received in the mail at the front desk. Tr., p. 136. Sharp testified that she writes on the top of the notice when she receives the notice, and that "When I receive it [the Notice], I immediately enter it into the computer." Tr., p. 135. Sharp did not follow that procedure, however, because neither Ex. A nor Ex. B indicate the date the Notice of Debtors' bankruptcy case arrived at either the front desk or Sharp's office. She testified that the Notice should have come back to her office from the front desk within a day or 2, but might not have. Tr., p. 135. Under questioning by the Court, Sharp

testified that she could not answer why she did not follow American General's normal procedure requiring the bankruptcy notice be entered onto the computer client notes immediately. Tr., p. 161. She testified: "I must have just been busy . . . and didn't complete writing it in the screen." Tr., p. 161.

Above the daily entries in Ex. A and B, American General's computerized account records indicate in the "Critical Data" box the existence of the Bruces' bankruptcy case. Ex. A includes a "Note: R Tarum Atty Chapt13*In Litigation – No Cust Contact". Ex. B's Note states: "Chapt13BK. Rtarum2600001*In Litigation No Cust Conta". But there is no indication on what date those notes first were entered on Ex. A and B. On re-cross examination Sharp admitted that American General could institute a procedure that enters on a customer screen notice of a bankruptcy immediately upon receipt. Tr., p. 159. Ex. B lacks any reference to the Debtors' petition date and refers the reader to the other account, Ex. A. Ex. A does not indicate the November 8, 2004, petition date until the November 30, 2004 entry, a week after Sharp testified Diane told her during a November 23, 2004, phone call about Debtors' Chapter 13 case, and six days after Sharp testified she received the Notice of Debtors' case. The actual Notice of Debtors' bankruptcy case received by American General, on which Sharp testified she wrote the date when she received it, was not offered into evidence by American General.

Eight days after the petition was filed on November 16, 2004, Sharp phoned Debtors' home and left a message with their daughter. Tr., p. 113; Ex. A, p. 3; Ex. B, p. 3. Six days later on November 22, 2004, Sharp called again and left another message with their daughter asking that Debtors to return her call. Tr., p. 113; Ex. A, p. 3; Ex. B, p. 3. Diane testified that she was very upset when she received those messages because she had thought she was protected by her

bankruptcy and that creditors would not contact her anymore, which Sharp's messages disproved. Tr., p. 32.

Before Thanksgiving on November 23, 2004, after 5:30 p.m. Sharp telephoned the Debtors at home. Steven answered the phone, and Sharp asked to speak with Diane about particulars of their loans. Tr., pp. 75-76. Steven gave Diane the phone and told her to tell Sharp to talk to their lawyer about the particulars. Tr., p. 76. Steven stayed in the room while Diane's conversation with Sharp took place, and he testified that it took about 5 minutes. Tr., p. 77. Diane spoke with Sharp about both loans. Tr., pp. 54-55; Ex. A, pp. 2-3; Ex. B, pp. 2-3. Diane testified that she told Sharp that they had filed bankruptcy and were still working out the terms with their attorney for repaying American General. Diane testified that she told Sharp during that call that she filed the petition on November 8, 2004. Tr., p. 48. Ex. A, pp. 2-3, Ex. B, pp. 2-3, and Steven's testimony all corroborate Diane's testimony that she told Sharp about her Chapter 13 case during that call. Tr., p. 85. Sharp admitted that Diane told her that they had filed a Chapter 13 with Randy Tarum, but Sharp testified that she had not known of their bankruptcy case prior to that call. Tr., p. 114. Sharp admitted that she had notice at the moment Diane told her of their bankruptcy filing, and that her phone call to the Debtors should have ended at that moment based on company policy. Tr., pp. 145-46. But Sharp did not end the conversation.

Diane testified that Sharp badgered her about making arrangements to make a payment, and Diane told Sharp she needed to call their attorney Tarum. Tr., pp. 49, 123. Diane testified that Sharp demanded a payment of \$312 for the second mortgage, and that she responded that she could not make payments because they were working on their Plan and intended to sell the vacant lot and pay the proceeds to American General for the land loan. Tr., pp. 33-34, 170-71.

Diane testified that Sharp became upset and said that was unacceptable because the second mortgage is a secured loan which is not usually put into a trustee plan. Tr., p. 34. Sharp testified that she asked Diane what their Chapter 13 Plan entailed and what they were intending to do with the second mortgage. Tr., p. 115. Sharp admitted that she cannot tell debtors what they can or cannot do in their plan. Tr., p. 147.

Ex. A and B have similar but not identical entries for Sharp's November 23, 2004, phone call to Debtors. Ex. A, pp. 3-4 shows a call by Sharp at 17:37 o'clock with the note:

PR [Phone Residence] – TT [talked to] Diane – She sd that they filed a Chapt 13 BK with Randy Tarum. She sd that they were told not to pay until they find out what is going on at the hearing on the 1st. She sd that they have us included in the plan, not just the arrearage. [I] told her will call Randy Tarum tomorrow and find out what is going on.

Ex. B, pp. 2-3, shows the 11/23/04 entry by Sharp at 11:36⁶ o'clock:

PR-TT Diane – She sd they filed Chapt 13 and the atty told her not to pay until they find out what happens at the hearing. She sd they have us included in the BK, not just arrearage. Told her will call Atty R. Tarum tomorrow and find out what is going on.

Sharp testified that she had not received the official Notice of Commencement of Debtors' bankruptcy filing in her office on any of the above dates when she called the Debtors, through November 23, 2004. Tr., pp. 127-28. She admitted that Diane advised her of their bankruptcy at the beginning of the conversation on November 23, 2004. Tr., p. 155.

Steven testified that, after Sharp's phone call, they thought they had done something wrong or hired the wrong lawyer because American General had not stopped calling. He testified that Diane's anxiety returned. Tr., p. 78. Diane called their attorney Tarum right after

⁶From the time and date, it is clear that Sharp made the entries on both accounts from one phone call with Diane, not 2 calls.

the phone call on November 23, 2004. Tr., p. 88.

Sharp phoned Tarum the next morning on November 24, 2004, and discussed the case.

Tr., pp. 118-119; Ex. A, p. 2. Sharp denied that the first thing Tarum said to her was to stop calling his clients. Tr., p. 142. Ex. A's entry for 11/24/04 states:

11:05 P Atty R Tarum – He sd that they are working on the Chapt 13 BK Plan right now. They are only putting the arrearages of this acct into the Plan. The customer is still supposed to be making the payment. He⁷ will contact them and have them get in touch with us about the payment.

Ex. A, p. 2

Ex. B's entry for 11/24/04 states with respect to the loan secured by the vacant lot:

11:06 P Atty Ra Tarum. He sd that the Chapt 13 Plan is almost ready to file. He sd that the customer is not going to make the payment on this, this acct will be included in the [sic] Chapt 13 Plan and the proceeds from the sale will go towards paying off this acct and any excess will go to the 13 Plan.

Ex. B, p. 2

Sharp testified that she can only do one screen at a time and does not have the exact record from one account when entering notes on the other account, which is why the entries on Ex. A and B for her November 24, 2004, phone call to Tarum are different. Tr., p. 165.

At 12:19 on November 24, 2004, the same date Sharp testified she received the Notice of Commencement of Debtors' Chapter 13 case, Sharp filed American General's Proofs of Claim⁸.

⁷Sharp testified that she was referring to Tarum as the person who was going to get back in touch with Sharp. Tr., p. 166. But that is not what the last sentence of the above entry says, i.e.: "and have them get in touch with us"

⁸American General filed two (2) Proofs of Claim, Nos. 4 and 5, on November 29, 2004, signed by Sharp on November 24. Claim No. 4 asserts a secured claim in the amount of \$5,439.00 secured by real estate. Claim No. 2 asserts a secured claim in the amount of \$15,327.93 secured by real estate. No attachments are included with either Proof of Claim, instead a notation at the bottom states they were forwarded to the Trustee and other parties.

Tr., p., 120; Ex. A, p. 2; Ex. B, p. 2. This is a slight departure from her normal practice. Under questioning by the Court Sharp testified that when she receives a bankruptcy notice she documents the date it is received on the top of the form with her initials, and then within a day or 2 she prepares the proof of claim and sends it to the Court with copies to other parties. Tr., pp. 159-60. There is no log for account activity other than the account notes on Ex. A and B.

On the Monday evening after Thanksgiving on November 29, 2004, again in violation of the stay and after being told by the Debtors and Tarum that they had filed a Chapter 13 petition, and 5 days after she admits receiving the Notice of Commencement, Sharp called the Debtors again and spoke with Diane for about 5 or 10 minutes about the second mortgage, after calling earlier during the day and leaving a message. Tr., pp. 50, 55, 84, 120-21; Ex. A, p. 1; Ex. B, p. 1. Sharp testified the call lasted 1 to 2 minutes. Tr., p. 121. Ex. A describes the November 29, 2004, phone call as follows:

17:41 PR– TT Dian – She sd that she tt [talked to] atty today and he sd that all the payments are included in the bankruptcy. Told her only the arrearage is included in the BK, she still needs to make the current payment. She sd to call him – she is not making the payment, told her will have the atty call tomorrow.

The second sentence from the above November 29 entry, stating that Sharp told Diane that only an arrearage is included in plan, contradicts Sharp's testimony at Tr., p. 147, that she knew she cannot tell them what they can or cannot do in their Plan.

Sharp testified that she knows it is American General's company policy not to phone after a bankruptcy, and that it is not normal procedure and in violation of company policy and was a mistake, but that she called anyway to check on the current payment on the second mortgage. Tr., pp. 120-21, 148. Sharp testified that American General's policies and procedures manual explains in detail how to handle bankruptcy filings, and says once you receive bankruptcy notice

you do not call the customer, you flag it as a bankruptcy account. Tr., p. 128.

Steven testified that he answered the call from Sharp on November 29, 2004, but turned it over to Diane because she had spent more time talking to their attorney and was privy to more information. Tr., p. 78. Diane testified that she was angry during the call, and told Sharp again that she had filed a bankruptcy and that Sharp should call her attorney Tarum. Tr., pp. 36, 51, 54. Steven corroborated Diane's account in his testimony. Tr., p. 79-80. Sharp admitted that Diane was agitated and that Diane told her to call their attorney. Tr., pp. 121-22. Sharp testified on redirect that standard company procedure would require a notation on the account that a client was angry, screaming or yelling. Tr., p. 156. In spite of that company procedure, Sharp did not note Diane's agitation that she testified she sensed, Tr., p. 121, on Ex. A during or after the November 29, 2004, call.

Diane testified that Sharp persisted, and said that Debtors needed to make a \$900 payment before 5:30 p.m. the next day or American General would foreclose on their house. Tr., pp. 36, 53-54. Diane responded that they were still working out their plan's treatment of American General, but that Sharp said she had already spoken with Tarum and Debtors still needed to make their payment. Tr., pp. 36-37. Diane testified that they were about \$600 or \$635 behind in their second mortgage payments, not \$900. Tr., p. 56.

Sharp denied in her testimony that she demanded \$900 from Debtors or that she threatened to foreclose. Tr., pp. 122-23, 128. However, Steven corroborated Diane's version, testifying: "Well, one of the things that came out of it, when Diane got off the phone, she said, "[t]hey're going to foreclose on us tomorrow if we don't give them \$900." Tr., p. 80. Sharp testified that \$900 would have been the total amount due on the second mortgage, that the normal

monthly payment would have been about \$312, and she admitted enquiring about the monthly payment. Tr., pp. 122, 149.

On rebuttal, Diane testified that the \$312 current payment was never discussed and that Sharp specifically told her she wanted \$900 by 5:30 on November 30, 2004, or they would commence foreclosure proceedings. Tr., pp. 167-68. She testified that she was upset and repeated that she discussed Sharp's demand with Steven. Tr., pp. 168. Steven testified that he recalled:

My wife saying, "No, no, you need to talk to the lawyer. No, you need to talk to the lawyer," was what my wife was saying. And, "We don't have this money that you're wanting. We do not have this money. You're going to have to talk to the lawyer. We've already filed bankruptcy. We don't need to talk to you about this. You know, we do not have the money that you're asking for."

Tr., p. 79.

In light of the dispute between Diane's and Sharp's testimony regarding Sharp's alleged demand for payment and threat of foreclosure, the Court needs to make a finding on witness credibility. Having observed the demeanor of Diane, Steven and Sharp while each testified under oath and subject to cross examination, the Court finds that Diane was a credible witness with respect to Sharp's demand for \$900 in payment and threat of foreclosure, and that Sharp was not credible in her denial. *In re Taylor*, 514 F.2d 1370, 1373-74 (9th Cir. 1975); *See also, Casey v. Kasal*, 223 B.R. 879, 886 (E.D. Pa. 1998). Diane's testimony was corroborated by Steven's testimony, which this Court finds credible, that Diane related Sharp's demand and threat immediately after hanging up. The Court notes several instances related above where Sharp changed her testimony or contradicted American General's exhibits: Twice with respect to the source of Diane's seizures, which contradicts Sharp's entry of November 22, 2004, on Ex. B, p.

7, where she noted Diane told her the seizures were from stress; her failure to note Diane's agitation on Ex. A on November 29, 2004, which she admitted she noticed; Sharp's entry on Ex. A for November 29, 2004, where she told Diane that only the arrearage and not the full claim may be included in the Plan, which contradicts Sharp's admission that she cannot tell debtors what to put in their plan; her admitted stay violations in violation of company policy not to call bankruptcy debtors; her inability to answer the Court why she did not follow American General's normal procedure requiring the bankruptcy notice be entered onto the computer client notes immediately; and her testimony that Tarum was to get back to her after the November 24, 2004, phone call to Tarum, which contradicts Ex. A's entry which Sharp made that Tarum will have the Debtors get in touch with American General. As a result of the Court's finding that Diane and Steven are credible, the Court accepts their testimony and finds that Sharp demanded a payment of \$900 on November 29, 2004, and threatened to commence foreclosure if they did not pay by 5:30 p.m. the following day, and the Court finds that Sharp's denial is not credible.

As a result of Sharp's November 29, 2004, phone call, Diane testified that she was very upset and had panic attacks and was up half the night trying to figure out what to do. Tr., pp. 37, 168. Steven confirmed that Diane's increased anxiety after the call. Tr., p. 80. Debtors did not have \$900, and could not reach Tarum because of it was too late that night. Tr., p. 168. Diane testified that she wondered why she bothered to file bankruptcy since the stay failed to protect her from Sharp's phone calls. Tr., p. 37.

Sharp testified that she called Tarum's office on November 30, 2004, and left a message, but did not have contact with him again. Tr., p. 119; Ex. A, p. 1; Ex. B, p. 1. Sharp testified that she left the note on Ex. A, p. 1, at 13:12 o'clock on November 30, 2004, stating: "The BK was

filed on 11/8/04" as an internal note to herself so that when she discussed things with Tarum it would be right in front of her. Tr., pp. 125-26.

On November 30, 2004, Tarum filed Debtors' motion for sanctions against American General based upon Sharp's phone calls to Debtors demanding payment, and particularly Sharp's telephone call of November 29, 2004, demanding \$900 by 5:30 p.m. on November 30, 2004, or American General would foreclose. Debtors' motion seeks damages in the form of distress and economic damages, and monetary damages for civil contempt under 11 U.S.C. § 105(a). Sharp testified that she received a fax'd copy of the motion on November 30, 2004, and forwarded it to her district manager. Tr., p. 126. Despite company policy requiring contemporaneous entries on computer accounts, Sharp did not enter the motion on Ex. A and B until the next day after 11:00 o'clock a.m. on December 1, 2004. Ex. A, p. 1; Ex. B, p. 1.

Debtors filed their Amended Plan on January 12, 2005⁹. The Trustee filed a consent, and an Order confirming Debtors' Plan was entered on January 20, 2005.

Steven testified that he and Diane suffered wage loss as a result of these proceedings against American General for appearing at hearing over 2 days, and that their income is as listed in their Schedules. Tr., p. 81. Schedule I lists their monthly gross incomes from Benefis Healthcare which totals \$3,715.72. Assuming 22 working days per month average, Debtors' total daily income is \$168.90. The Court finds that during trial Steven and Diane suffered damages for actual lost income in the amount of \$337.80 as a result of these proceedings.

⁹Both of American General's secured claims are treated in Debtors' confirmed Plan as impaired secured claims.

CONTENTIONS OF THE PARTIES

Debtors seek sanctions against American General to restore the integrity of the bankruptcy system for themselves and protect American General's other customers that could be subjected to similar willful violations of the stay because of its failure to adopt procedures to protect against stay violations. Debtors allege four willful violations of the stay by American General by phone calls, and argue that American General had actual notice of their bankruptcy case based on the "mailbox rule" within a few days after November 11, 2004, when the Notice of Commencement was mailed. Debtors argue that Sharp did not follow her normal procedure to docket the receipt of the Notice of Commencement of the Debtors' case, and that Sharp did not know when the Notice was actually received in American General's office. Debtors submit that all four calls were intentional and willful violations of the stay, and that the November 29, 2004, call was made after Tarum told Sharp to stop calling his clients. In that call, Debtors argue, Sharp pressed Diane for payment of \$900 in 24 hours or American General would foreclose, and Debtors contend that Sharp attempted to minimize her threat as a mistake and demand for a lesser amount.

Debtors ask for actual damages, including \$25,000 for emotional distress to Diane caused by Sharp's violations of the stay which reversed Diane's recovery from stress, and caused Diane panic attacks after Sharp's call of 11/29/04, \$5,000 in emotional distress to Steve, and \$1,000 for each of their daughters for their emotional distress. Debtors ask for leave to submit a billing statement of their attorney's fees and costs associated with their motion, and ask for lost wages for two days of hearings totaling \$371.56.

Next, based on American General's failure to treat bankruptcy notices differently from

other mail, and its use of internal delays to excuse violations of the stay, Debtors request punitive damages for American General's "arrogant defiance" and institutional disregard for the bankruptcy system, and for Sharp's bad faith and dishonest purpose in her postpetition phone calls attempting to improve American General's position by giving the Bruces legal advice regarding how they could treat American General in their plan. Debtors request punitive damages in the range of \$10,000 to \$50,000 based upon American General willful violations in this case, American General's nationwide size and Sharp's decades of experience, and their sophistication in lending and bankruptcy matters. As additional punitive damages, Debtors request that the Court avoid American General's liens on their property and discharge their debts to American General, which they claim are in the amounts of \$5,439.00 and \$15,327.93.

American General contends that Sharp made only one phone call in violation of the stay after learning of the Debtors' bankruptcy, and that damages would not be appropriate for such a "mistake". American General argues that a simple phone call from Tarum instead of a motion for sanctions could have remedied the mistake, and that awarding anything would encourage unnecessary litigation and unduly punish a lender which has adequate policies in place to prevent postpetition contact.

American General argues that not every mistaken violation of the stay justifies recovery under § 362(h), and cites *In re Roman*, 283 B.R. 1, 11-12 (9th Cir. BAP 2002) decrying the cottage industry of precipitous § 362(h) litigation. American General argues that Sharp's one phone call was *de minimis* and does not warrant sanctions, and that Debtors have not proven emotional distress damages, significant harm, or a nexus between the damages and the stay violation because of the Debtors' other health and family problems. Finally, American General

argues that Debtors did not mitigate their damages because they did not seek to correct the problem before racing into court.

DISCUSSION

I. Automatic Stay – § 362(a).

The Debtors' filing of her Chapter 13 bankruptcy petition on November 8, 2004, gave rise to an "automatic stay". 11 U.S.C. § 362(a). The Ninth Circuit construed the automatic stay in *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1081-82 (9th Cir. 2000):

The automatic stay is self-executing, effective upon the filing of the bankruptcy petition. See 11 U.S.C. § 362(a); *The Minoco Group of Companies v. First State Underwriters Agency of New England Reinsurance Corp. (In re The Minoco Group of Companies)*, 799 F.2d 517, 520 (9th Cir.1986). The automatic stay sweeps broadly, enjoining the commencement or continuation of any judicial, administrative, or other proceedings against the debtor, enforcement of prior judgments, perfection of liens, and "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6).

The Ninth Circuit Bankruptcy Appellate Panel ("BAP") explained the automatic stay in *Balyeat Law Offices, P.C. v. Campbell*, 14 Mont. B.R. 132, 136-37 (9th Cir. BAP 1995):

"Congress' intent in enacting § 362(a) is clear--it wanted to stop collection efforts for all antecedent debts." *Gonzales v. Parks*, 830 F.2d 1033, 1035 (9th Cir. 1987) (quoting *In re M. Frenville Co., Inc.*, 744 F.2d 332, 334 (3rd Cir. 1984). *cert. denied*, 469 U.S. 1160 (1985). "Section 362(a) automatically stays a wide array of collection and enforcement proceedings." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 560 (1990). See also *Delpit v. C.I.R.*, 18 F.3d 768, 770 n.1 (9th Cir. 1994). "Section 362 is extremely broad in scope and should apply to almost any type of formal or informal action." *Id.* at 771 (quoting 2 *COLLIER ON BANKRUPTCY*, § 362.04 at 362-34 (15th ed. 1993). It "prohibits acts that, but for the stay, would be lawful." *In re Zartun*, 30 B.R. 543, 545 (9th Cir. BAP 1983). The stay is created for the benefit of the debtor, the debtor's property and the debtor's estate. *In re Casquel of Nevada, Inc.*, 22 B.R. 65, 66 (9th Cir. BAP 1982).

The Ninth Circuit has repeatedly reiterated the broad scope of the automatic stay as "one of the most important protections in bankruptcy law." See *In re Risner*, 317 B.R. 830, 835 (Bankr. D.

Idaho 2004), quoting *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214-15 (9th Cir. 2002)¹⁰; *Hillis Motors, Inc. v. Hawaii Auto Dealers' Assoc.*, 997 F.2d 581, 585 (9th Cir. 1993). Recently in *Dawson v. Wash. Mutual Bank (In re Dawson)*, 390 F.3d 1139, 1147-48 (9th Cir. 2004), the Ninth Circuit quoted the House Report, H.R.Rep. 95-595, at 125-26 describing the harassment a consumer debtor suffers that led him to bankruptcy, from which the stay gives a respite: “The harassment takes the form of abusive phone calls at all hours, including at work, threats of court action” Sharp’s phone calls to the Debtors during evenings and holiday weekends fit within such definition of harassment.

Given the broad, self-executing, automatic stay described above, the Court begins by rejecting American General’s contention that only one automatic stay violation occurred in this case on November 29, 2004. The undisputed evidence including Ex. A shows that Sharp made four phone calls postpetition to the Debtors, on November 16, 22, 23, and 29, 2004. Each call violated the automatic stay, and as actions taken in violation of the automatic stay all are void, not merely voidable. *Gruntz*, 292 F.3d at 1082; *40235 Washington Street Corp. v. Lusardi*, 329 F.3d 1076, 1082 (9th Cir. 2003); *Schwartz v. United States*, 954 F.2d 569, 570-71, 575 (9th Cir.1992); *In re Deines*, 17 Mont. B.R. 114, 115 (Bankr. Mont. 1998); *Hillis Motors, Inc. v. Hawaii Auto Dealers' Assoc.*, 997 F.2d at 586. Whether all four phone calls were willful violations the stay for which sanctions may be imposed under § 362(h) is another issue discussed below.

II. § 362(h) – Willful Violation of the Stay.

¹⁰At footnote 5 *Risner* quotes *Eskanos v. Adler* that: “Consistent with the plain and unambiguous meaning of the statute, and consonant with Congressional intent, we hold that § 362(a)(1) imposes an affirmative duty to discontinue post-petition collection actions.” 317 F.3d at 835 n.5, quoting *Eskanos v. Adler*, 309 F.3d at 1215.

This Court construed § 362(a) & (h) in *In re Reece*, 15 Mont. B.R. 474, 477-78 (Bankr.

D. Mont. 1996):

As to the relevant Bankruptcy Code provisions, when a debtor files a bankruptcy petition, a stay is automatically imposed applicable against all creditor collection activity. 11 U.S.C. § 362(a). The stay is effective upon the date of the filing of the petition; and does not depend on formal service of process. *In re Smith*, 876 F.2d 524, 526 (6th Cir.1989). Furthermore, the Code requires the creditor, pursuant to § 362(d), to take affirmative action to obtain relief from stay from a bankruptcy court. In the absence of affirmative action on the part of the creditor to obtain relief from stay, § 362(a) prevents the creditor from attempting to enforce its rights against a debtor. See *In re Sharon*, 200 B.R. 181, 187 (Bankr. S.D. Oh. 1996).

Turning to the law governing violation of the automatic stay, 11 U.S.C. § 362(h), this Court has held:

To be actionable, a violation of the automatic stay must be "willful." In *In re Bloom*, 875 F.2d 224, 227 (9th Cir.1989), the term "willful", as used in § 362(h) was addressed and defined: "This circuit has not defined 'willful' as it is used in subsection (h). A useful definition, which we now adopt, was provided by the bankruptcy court for the district of the District of Columbia: A 'willful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded. *Inslaw, Inc. v. United States (In re Inslaw, Inc.)*, 83 B.R. 89, 165 (Bankr.D.D.C.1988)."

In re Christopherson, 8 Mont. B.R. 213, 111 B.R. 920, 922 (Bankr. Mont. 1990).

The Court further explained:

"[T]he relief provided for willful violation of the stay under 11 U.S.C. § 362(h) is mandatory" since § 362(h) supplements but does not replace the pre-existing remedy of civil contempt. *In re Lile*, 103 B.R. 830, 836 (Bankr.S.D.Tex.1989). Thus, when a party acts with knowledge of a pending bankruptcy, a violation of the stay is considered willful and damages must be assessed, *Id.* at 836, for "[T]he creditor takes the risk of being assessed for damages if he fails to obtain clarification from the bankruptcy court." *Id.* at 837,

citing *In re Clark*, 49 B.R. 704, 707 (Bankr.D.Guam 1985); and *In re Pody*, 42 B.R. 570, 573-574 (Bankr.N.D.Ala.1984). *Lile*, supra, at 841 further states that where a Debtor is forced to resort to the courts to enforce his right, attorney's fees should be awarded to the Debtor under § 362(h). See also, *In re Price*, 103 B.R. 989 (Bankr.N.D.Ill.1989).

Id. at 923.

The above test for willful violation under § 362(h), (1) that the creditor knew of the stay, and (2) the creditor's actions which violated the stay were intentional, was repeated in *Roman*, 283 B.R. at 8, which also noted the above standard that lack of specific intent to violate the stay is not a required element to find a willful violation, and that "it is clear that once a creditor or actor learns or is put on notice of a bankruptcy filing, any actions intentionally taken thereafter are 'willful' within the contemplation of § 362(h)." *Risner*, 317 B.R. at 835; *Eskanos & Adler*, 398 F.3d at 1214-15. In *In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003), the Ninth Circuit noted that § 362(h) provides for damages for willful violation of the stay upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were willful. See, *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995) (cited in *Roman*, 283 B.R. at 12-13). Further, a party with knowledge of bankruptcy proceedings is charged with knowledge of the automatic stay. *Dyer*, 322 F.3d at 1191, citing *Pinckstaff v. United States*, 974 F.2d 113, 115 (9th Cir. 1992).

American General's response to Debtors' motion for sanctions denied all allegations and requested the Court dismiss Debtors' motion for sanctions "as unfounded and without merit." But at trial Sharp's testimony removed any doubt that she willfully violated the stay by her phone calls to Debtors on behalf of American General after she learned of Debtors' bankruptcy.

It is not necessary for the Court to decide Debtor's contention that the "mailbox rule"

warrants a presumption that American General received the Notice of Commencement in time to be charged with willful violations on November 16 and 22, 2004, when Sharp called Debtors' home and left messages with their daughter. The calls Sharp made on November 23, 2004, after Diane told her that they filed a Chapter 13 petition, and on November 29, 2004, provide sufficient basis for imposition of sanctions, as discussed further below.

The record is unclear as to exactly when American General received the Notice of Commencement at Sharp's branch office. Sharp could not testify which date the Notice arrived, and could not answer the Court's question why she did not follow company policy that the Notice immediately be entered on the computer record upon receipt. Tr., p. 161. The obvious way to determine when American General received the Notice would be to examine the Notice with Sharp's notation of receipt date, but American General failed to produce the Notice it received. A party's failure to produce evidence, which under the circumstances would be expected, leads to an inference that the Notice would not have buttressed American General's position or indeed would have undercut it. *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 174, 94 S.Ct. 414, 420, 38 L.Ed.2d 388 (1973); *See also P.R. Mallory Co. v. NLRB*, 400 F.2d 956, 959 (7th Cir.1968), *cert. denied*, 394 U.S. 918, 89 S.Ct. 1191, 22 L.Ed.2d 452 (1969) ("[F]ailure to produce evidence, which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it."). American General's failure to produce the Notice it received from the Clerk of the Bankruptcy Court with Sharp's notation when she received it gives rise to a presumption against American General. Such presumption is not dispositive or necessary in the instant case, however, because Sharp's continuation of the phone call on November 23, 2004, after learning of the Debtors' bankruptcy filing, and her call on

November 29, 2004, by themselves provide sufficient evidentiary basis to grant Debtors' motion for sanctions for willful violations of the stay.

American General argues that it did not receive notice of the bankruptcy stay until November 24, 2004, after Sharp's November 23, 2004, call. In rejecting an improper corporate address argument one court aptly noted:

[W]hile an octopus may have eight legs, it is still the same octopus. As a result, bankruptcy law not only requires, but demands, that companies, whether large or small, have in place procedures to ensure that formal bankruptcy notices sent to an internally improper, but otherwise valid corporate address are forwarded in a prompt and timely manner to the correct person/department. As a consequence, Ocwen's defense that its collection efforts against the Debtors were merely the result of a flaw in its internal organizational structure--the argument that the right hand does not know what the left hand is doing--falls on deaf ears.

This rule has been universally followed by other bankruptcy courts, and is really just an extension of the principle that corporations are expected to have in place procedures to ensure that they comply with all areas of the law.

In re Perviz, 302 B.R. 357, 367 (Bankr. N.D. Ohio 2003). *See Associated Credit Services, Inc., v. Champion (In re Champion)*, 294 B.R. 313, 317 (9th Cir. BAP 2003) (“[C]reditor’s ‘internal disorder does not excuse it from violating the automatic stay.’ *Eskanos v. Adler*, 309 F.3d at 1215.”).

In the instant case American General appears to have in place procedures to ensure it complies with the automatic stay. Sharp simply failed to follow American General's procedures governing immediate entry of bankruptcy notices on its computer records and cessation of contact, even though she was aware of the procedures. When told of Debtors' bankruptcy at the beginning of her call on November 23, 2004, Sharp knew she should have terminated the call and flagged the case in a manner sufficient to notify all of American General's arms of the

bankruptcy, and should have ceased all collection efforts until it obtained clarification or relief from the stay from this Court. *In re Forty-Five Fifty-Five, Inc.*, 111 B.R. at 923, quoting *In re Lile*, 103 B.R. at 837. Instead American General's branch manager ignored not only the stay, but also ignored its own practices, policies and procedures.

The evidence is uncontroverted and repetitive that Diane told Sharp at the beginning of the call on November 23, 2004, that they had filed a Chapter 13 petition. Ex. A and B both reflect that Diane told Sharp of their petition. Diane and Steven both testified Diane told Sharp of the petition and repeatedly told her to call their attorney, all of which Sharp admitted and further admitted she was on notice at that point and should have terminated the call, but she did not. An innocent stay violation can become willful if the creditor fails to remedy the violation after receiving notice of the stay. *In re Del Mission Ltd.*, 98 F.3d 1147, 1151 (9th Cir. 1996); *Abrams v. Southwest Leasing and Rental Inc. (In re Abrams)*, 127 B.R. 239, 241-44 (9th Cir. BAP 1991). Sharp's continuation of the call to Debtors on November 23, 2004, and her subsequent call to Debtors on November 29, 2004, both were intentional and with knowledge of the bankruptcy stay, and as such both were willful violations of the stay. *Eskanos & Adler*, 398 F.3d at 1214-15; *In re Dyer*, 322 F.3d at 1191; *Roman*, 283 B.R. at 8; *Risner*, 317 B.R. at 835; *Reece*, 15 Mont. B.R. at 477-78.

American General's contention that Sharp's call on November 29, 2004, was a "mistake" is without merit as a defense. Neither is American General's argument that a simple phone call from Tarum instead of a motion for sanctions would have corrected the problem because of American General's adequate policies and procedures. For one thing, American General's policies and procedures proved inadequate because Sharp repeatedly failed to follow them.

Further, Sharp already knew of Debtors' bankruptcy and had spoken with their attorney Tarum when she willfully violated the stay by calling Debtors again on November 29, 2005. Although Sharp denied that Tarum told her not to call his clients, it does not matter whether he did or did not for § 362(a) and (h) to apply. *In re Forty-Five Fifty-Five, Inc.*, 111 B.R. 920, 923 (Bankr. D. Mont. 1990) explains that "when a party acts with knowledge of a pending bankruptcy, a violation of the stay is considered willful and damages must be assessed." *In re Lile*, 103 B.R. at 836. "The creditor takes the risk of being assessed for damages if he fails to obtain clarification from the bankruptcy court." *In re Forty-Five Fifty-Five, Inc.*, 111 B.R. at 923, quoting *In re Lile*, 103 B.R. at 837.

American General did not seek clarification or obtain relief from the stay from this Court before Sharp continued her phone call to Diane with knowledge of their pending bankruptcy on November 23, 2004, and when she called them again on November 29, 2004. *See Reece*, 15 Mont. B.R. at 477-78. Sharp testified that she knew she should not have called Debtors on November 29, 2004, and knew that company policy prohibited her from calling the Debtors, but proceeded to call anyway. A party's violation of the stay may be willful even if a creditor believed itself justified in taking an action found to be violative of the automatic stay. *In re Cinematronics, Inc.*, 111 B.R. 892, 900 (Bankr. S.D. Cal. 1990), the court wrote:

The creditor takes a calculated risk where it undertakes to make its own determination of what the stay means. *In re Gray*, 97 B.R. 930, 936 (Bankr. N.D. Ill. 1989). To disagree with Theodore Roosevelt, at least when the automatic stay is concerned, it is far better to be a "timid soul" who seeks a court determination of the limits of the stay, rather than to fail "while daring greatly."

Next, American General argues the violations were *de minimis* because the calls were so short, as Sharp testified one or two minutes each. The Court finds Steven's and Diane's

estimates that the two calls lasted five or ten minutes each more credible, when compared with the entries on Ex. A and B. The Court finds American General's willful stay violations were not *de minimis*.

American General contends that it did not receive the Notice of Commencement of the case until November 24, 2004, and therefore cannot be held in willful violation of the stay before that date. Sharp's testimony was conflicting, and she ultimately admitted she does not know when the Notice arrived at her branch office. Sharp testified that she received the Notice and wrote its receipt date on November 24, 2004. However, Ex. A and B, which Sharp testified were American General's complete, permanent accounts, do not include the date the Notice was received even though Sharp testified that company policy requires it be entered immediately. Sharp did not enter the petition date on the computer until November 30, 2004, after she violated the stay, and she testified she only entered the petition date then as an internal note to herself for when she spoke with Tarum, which she never did again until trial.

The BAP explained in *Campbell*, 14 Mont. B.R. at 149-50:

Section 362(h) provides:

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

"Whether the party believes in good faith that it had the right to property is not relevant to whether the act was willful or whether compensation must be awarded." [*In re Abrams*, 127 B.R. 239, 243 (9th Cir. BAP 1991)]. A willful violation of the stay occurs where the party accused of such violation acts intentionally with the knowledge that the automatic stay is in place. Specific intent to violate the stay is not required. *Bloom*, 875 F.2d at 226.

In re McMillan, 18 Mont. B.R. 21, 29 (Bankr. D. Mont. 1999).

Under the above authority, § 362(h) permits a person injured by any willful violation to recover actual and punitive damages. *Eskanos & Adler*, 309 F.3d at 1215. In addition to actual damages, an award of attorney's fees and costs is mandatory upon finding a willful violation of the stay under § 362(h). *Roman*, 283 B.R. at 9, 15; *In re Walsh*, 219 B.R. 873, 876 (9th Cir. BAP 1998). Having found two willful violations of the stay by American General on November 23, 2004, and November 29, 2004, Debtors are entitled to an award of their actual damages for lost wages in the amount of \$337.80 and their attorney's fees and costs, for which the Court shall direct Debtors' attorney Tarum to submit an affidavit of fees and costs.

III. Emotional Distress.

Recently in *Dawson v. Wash. Mutual Bank*, 390 F.3d 1139, 1148-49 (9th Cir.2004), the Ninth Circuit held that under § 362(h), emotional distress damages are cognizable if a party provides clear evidence to establish that significant harm occurred as a result of the violation. Fleeting or trivial anxiety or distress does not suffice, instead an individual must suffer significant emotional harm. *Id.*, at 1149.

Debtors seek damages for emotional distress for Diane in the amount of \$25,000, \$5,000 for Steven and \$1,000 for each of their daughters. American General argues that any willful violations were *de minimis* and do not warrant sanctions, and that Debtors have not proven emotional distress damages, significant harm, or a nexus between the damages and the stay violation because of the Debtors' other health and family problems.

It must be clear that an individual suffered significant emotional harm caused by the violation of the stay to support an award for emotional distress. *Dawson*, 390 F.3d at 1149. An

individual may establish emotional distress in several different ways, including: Corroborating medical evidence, testimony of family members, friends or coworkers as to manifestations of mental anguish which clearly establishes that significant emotional harm occurred; or, in cases where the violator engaged in egregious conduct, without corroborative evidence where the individual suffers significant emotional distress and the circumstances surrounding the violation make it obvious that a reasonable person would suffer significant emotional harm. *Dawson*, 390 F.3d at, 1149-51.

The Court finds none of the above standards justify an award of emotional damages to Steven or the Debtors' children. The evidence shows the children, if anything, proved resilient and determined to help, although they were aware of the problems. Steven testified that he shut down emotionally watching his wife suffer, but did not establish that he suffered headaches, loss of sleep, or doctor visits such as noted in *Dawson*, 390 F.3d at 1149-50, *citing Varela v. Ocasio (In re Ocasio)*, 272 B.R. 815, 821-22 (1st Cir. BAP 2002) (per curiam).

Turning to Diane, Debtors offered no corroborating medical evidence of health care professionals. They did offer Diane's testimony and the testimony of Steven, a family member, who described Diane as angry, very upset, with increased anxiety and panic attacks and up half the night trying to figure out what to do after Sharp's November 29, 2004. Tr., pp. 37, 80, 168. Sharp testified that Diane became agitated, although she failed to follow company policy to note it. Tr., pp. 121-22, 156.

American General argues that Debtors failed their burden to prove significant harm or causal connection or nexus between the stay violation and emotional distress. It contends that the Debtor had a history of health problems for herself and her family as well as money

problems, suicidal thoughts, and stress from her father's illness. The general rule in Montana is that a defendant must take the plaintiff as he finds her and accept liability for all consequences flowing from the injury. *Lutz v. U.S.*, 685 F.2d 1178, 1186-87 (D. Mont. 1982), citing W. Prosser, *The Law of Torts*, § 43 at 260-63 (4th ed. 1971). Sharp willfully violated the stay by calling Diane with the knowledge that Diane a month earlier told her that she suffered seizures because of the stress she was under, as shown by the September 14, and September 22, 2004, entries on Ex. A, p. 8, and Ex. B, p. 8, which put Diane in the ICU. Sharp changed her testimony twice about the source of Diane's stress. Tr., p. 138. American General may not escape liability for emotional damages Diane suffered from its willful violations of the stay when it knew she was suffering from stress related health problems.

Debtors' testimony that Diane's condition improved immediately after they filed their Chapter 13 petition, and worsened when Sharp violated the stay, is uncontroverted. In discussing emotional damage awards this Court noted in *Miller v. Snavely*, 19 Mont. B.R. 300, 354-55 (Bankr. D. Mont. 2002), quoting Ninth Circuit cases:

While objective evidence requirements may exist in other circuits, such a requirement is not imposed by case law in either Washington, the Ninth Circuit, or the Supreme Court. See [*Herring v. Dept. of Social and Health Services*, 81 Wash.App.1, 914 P.2d 67, 77-83 (Wash. Ct. App. 1996)] (upholding damage award in excess of \$1,000,000, including \$550,000 for emotional damages, in disability discrimination and retaliation case based on testimonial evidence of emotional harm); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir.1985) (upholding emotional damages based solely on testimony); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir.1994) (noting that emotional damages may be awarded based on testimony alone or appropriate inference from circumstances); *Carey v. Phipus*, 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (noting that emotional distress damages are "essentially subjective" and may be proven by reference to injured party's conduct and observations by others). See also *Merriweather v. Family Dollar Stores*, 103 F.3d 576, 580 (7th Cir.1996) (noting that plaintiff's

testimony can be enough to support emotional damages).

Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 513 (9th Cir. 2000).

In *Johnson v. Hale*, a housing discrimination case out of Billings, Montana, the Ninth Circuit wrote:

[C]ompensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms. *Id.* at 1193 (citing *Phiffer v. Proud Parrot Motor Hotel*, 648 F.2d 1353548, 552-53 (9th Cir.1980); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir.1974)). We also emphasized that "both plaintiffs provided detailed and substantial testimony to support their claims that they suffered emotional distress as a result of the Hales' discriminatory acts" and that "[t]he Hales offered no evidence to rebut this testimony."

Johnson v. Hale, 13 F.3d 1352–53.

Likewise in the instant case, both Debtors provided detailed and substantial testimony that Diane suffered significant emotional distress as a result of Sharp's willful violations of the stay. The Court finds American General liable for Diane's emotional distress based upon Debtors' testimony, Ex. A and B, and inference from the circumstances surrounding the violation which make it obvious that a reasonable person prone to stress-related seizures would suffer significant emotional harm from postpetition willful violations of the stay, let alone demands for immediate payment of money Debtors did not have with the threat of foreclosure as shown by the evidence in the instant case. *See Dawson*, 390 F.3d at 1150-51; *Miller v. Snavelly*, 19 Mont. B.R. at 354-55; *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d at 513; *Johnson v. Hale*, 13 F.3d 1352–53.

In Montana, proximate cause now consists of either the "but for" or the "substantial factor" test. *Estate of Strever* (1996), 278 Mont. 165, 175-76, 924 P.2d 666, 672 (1996);

Gaudreau v. Clinton Irrigation Dist., 2001 MT 164, ¶ 34, 306 Mont. 121, 128, ¶ 34, 30 P.3d 1070, 1076, ¶ 34. The Court finds and concludes that Debtors clearly established a causal connection between Diane's significant emotional distress and American General's violations of the stay, as distinct from her prepetition health and family problems and the anxiety and pressures inherent in the bankruptcy process. *Dawson*, 390 F.3d at 1149. Debtors' testimony clearly showed that Diane enjoyed immediate improvement after they filed their petition, which reversed only when Sharp continued to call in violation of the stay.

Although the Court will address it more fully below, the Court finds that Sharp engaged in conduct in circumstances which make it obvious that a reasonable person would suffer significant emotional harm when she demanded \$900 from Diane by the next day on November 29, 2004, or she would commence foreclosure. In *Dawson*, the Ninth Circuit noted that significant emotional harm may be readily apparent even without corroborative evidence in circumstances which make it obvious that a reasonable person would suffer significant emotional harm. *Dawson*, 390 F.3d at 1150-51, citing *United States v. Flynn*, 185 B.R. 89, 93 (S.D. Ga. 1995) (affirming \$5,000 award of emotional distress damages without corroborating testimony because "it is clear that appellee suffered emotional harm" when she was forced to cancel her son's birthday party because her checking account had been frozen, even though the stay violation was brief and not egregious). In the instant case Sharp knew of Diane's stress related problems and the bankruptcy stay on November 29, 2004, and notwithstanding called Diane after business hours, argued with her about their Plan (Ex. A, p. 1), and demanded Debtors pay \$900 by the next day or American General would foreclose. Considering such facts in light of *Dawson* and the facts of *United States v. Flynn*, this Court awards the Debtors' the sum of \$10,000 in

emotional damages for the significant emotionally harm Diane suffered which they clearly established by their testimony and the circumstances as caused by American General's willful violations of the stay.

IV. Punitive Damages.

The BAP explained in *Campbell*, 14 Mont. B.R. at 149-50, that § 362(h) provides that an individual injured by any willful violation of a stay may recover, in appropriate circumstances, punitive damages. *See also In re McMillan*, 18 Mont. B.R. at 29. Debtors seek an award of punitive damages against American General of between \$10,000 to \$50,000, and in addition to avoid American General's liens. The Court will not go as far as the Debtors' prayer for punitive damages, but the Court deems an award of punitive damages against American General appropriate under these circumstances.

American General argues that no award of damages is appropriate in this case because it has sufficient policies and procedures in place, and Debtors failed to mitigate their damages when one phone call from Tarum to Sharp would have corrected the stay violation. As this Court has noted, American General may have had policies and procedures in place, but they were not followed in several instances by their branch manager Sharp. American General is a nationwide financial institution, experienced in bankruptcy cases, not a private creditor. As such, American General does not have the excuses of inexperience or unfamiliarity to avoid conforming its collection practices and procedures with the automatic stay. It is simply not acceptable, and not excusable as a "mistake", for American General's employees to willfully violate the automatic stay in violation not only of § 362(a) and § 362(h), but also in violation of American General's own policies and procedures. The Court deems a significant award of punitive damages

appropriate, both to punish American General for Sharp's willful violations of the stay, and to deter future violations and provide incentive for American General to see that its policies and procedures are implemented and followed.

Based upon the record, American General's size and sophistication, the Court awards Debtors punitive damages against American General in the sum of \$10,000. The Court declines Debtors' request to avoid American General's liens on Debtors' property.

V. Failure to Mitigate.

American General cites *Roman* for the proposition that Debtors' only claimed damages were incurred prosecuting their motion for sanctions. In *Roman*, a case involving § 362(h) willful violations, the BAP affirmed a bankruptcy court's adjustment of debtor's attorney fee request from \$2,000 to \$1,000 as reasonable, and did not reverse the award based upon the debtor's failure to mitigate even though the debtor's other actual damages consisted of only \$5 in travel expense. 283 B.R. at 12. In the instant case Debtors' showed actual damages many times larger than the debtor's \$5 damages from their lost wages.

The BAP noted that bankruptcy courts must examine whether the debtor could have mitigated the damages, and that courts especially scrutinize cases where the debtor's only injuries are those incurred litigating the motion and there exist no circumstances warranting punitive damages. *Roman*, 283 B.R. at 12; *McHenry v. Key Bank*, 179 B.R. 165, 168 (9th Cir. BAP 1995). The instant case involves damages for emotional distress and lost wages, as well as circumstances warranting punitive damages, and thus *Roman* is not authority to deny Debtors relief for American General's willful violations of the stay based on failure to mitigate.

Indeed, the BAP rejected the creditor's attempt to deflect the blame for the damages from

its willful stay violation on the basis of the debtor's duty to mitigate, just as American General attempts to blame the Debtors in the instant case, noting that the creditor failed its burden to establish administrative safeguards to prevent stay violations and to restore the status quo by undoing them. *Roman*, 283 B.R. at 12 (citing cases). In the instant case American General argues that it has adequate administrative safeguards in the form of its policies and procedures. However, the record above is replete with examples of Sharp failing to follow company policy and procedures, such as to immediately enter bankruptcy notices on the computer, prohibiting employees from contacting bankruptcy debtors, and that Sharp knew she should have terminated her call to Diane on November 23, 2004, when Diane told her they had filed a Chapter 13 petition. Sharp did not terminate that phone call as she knew she should and company policy required, and called the Debtors again on November 29, 2004, after talking to their attorney Tarum. American General contends that one more phone call from Tarum would have cured the violation, but the evidence shows that Sharp persisted in willfully violating the stay in violation of company policy even after Diane repeatedly told her to talk to their attorney, and after she spoke with their attorney. Clearly American General's policies and procedures, or its supervision and/or enforcement of such policies and procedures, were not, as it argues, adequate to prohibit willful violations of the stay such as shown by the evidence of Sharp's violations in this case. One more phone call from Tarum would not have corrected the "mistake". The Court finds that Debtors satisfied whatever duty to mitigate imposed on them under the decision in *Roman*, and that American General failed its burdens to prevent stay violations and undo them. *Roman*, 283 B.R. at 12.

Finally, the BAP noted that a debtor's attorney fees and costs are "actual damages" under

§ 362(h). *Roman*, 283 B.R. at 10. Accordingly, the Debtors will be awarded reasonable attorney's fees and costs incurred in bringing their motion, to be submitted by affidavit with service upon American General's attorney and an opportunity to respond and request a hearing on the amount of requested attorney's fees and costs.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334 and 157.

2. The pending Debtors' motion for sanctions for violation of the stay is a core proceeding under 28 U.S.C. § 157(b).

3. The Debtors satisfied their burden of proof by a preponderance of the evidence to show that American General violations of the automatic stay on November 23, 2004, and November 29, 2004, were willful based upon American General's branch manager's actual knowledge of the Debtors' bankruptcy, and that actual damages, attorney's fees and costs, and punitive damages are appropriate as sanctions under 11 U.S.C. § 362(h).

4. Debtors satisfied their burden of proof by clear evidence which established that the Debtor Diane Bruce suffered significant emotional distress, harm, and damages caused by and as a result of American General's willful violations of the automatic stay, which are cognizable under § 362(h). *Dawson v. Wash. Mutual Bank*, 390 F.3d 1139, 1146-50 (9th Cir. 2004).

5. American General failed its burdens to prevent stay violations and undo them. *In re Roman*, 283 B.R. 1, 12 (9th Cir. BAP 2002).

IT IS ORDERED a separate Order shall be entered overruling American General's objection and granting Debtors' motion for sanctions against American General for willful

violation of the automatic stay under 11 U.S.C. § 362(h); Debtors' attorney will be granted ten (10) days to file an affidavit of attorney's fees and costs incurred in litigating Debtors' motion, with service upon American General, and American General will have ten (10) days thereafter to file a response and request a hearing on Tarum's request for attorney's fees and costs; and after Tarum's attorney's fees and costs are determined the Court will enter Judgment against American General imposing sanctions for willful violations of the automatic stay in conformity with the above Memorandum of Law, including actual damages for lost wages in the sum of \$337.80, damages for significant emotional distress to Diane caused by American General's willful stay violations in the amount of \$10,000, punitive damages in the amount of \$10,000, and Debtor's attorney's fees and costs.

BY THE COURT

A handwritten signature in cursive script that reads "Ralph B. Kirscher". The signature is written in black ink and is positioned above a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana